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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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DEC 10 1996

Federal Communications Commission  
Office of Secretary

In re

Request of Cellular Communications of  
Puerto Rico, Inc. to Hold Auctions to  
License Certain Cellular RSAs

RM-8897

To: Chief, Commercial Wireless Division  
Wireless Telecommunications Bureau

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REPLY COMMENTS OF THE RSA OPERATORS GROUP

The RSA Operators Group ("RSAOG") by its counsel, respectfully submit their Reply Comments concerning the Petition for Declaratory Ruling or, in the Alternative, for Rulemaking ("Petition") filed by Cellular Communications of Puerto Rico ("CCPR").<sup>1</sup>

Approximately twenty commenters responded to the Commission's request for comments on the Petition. Of those, all but two oppose the use of auctions as a means of selecting permanent licensees for the subject six RSA licenses, and those two commenters are ineligible even to apply for the licenses for which they desire to bid. Like CCPR, each of the two commenters supporting the use of auctions, Bell Atlantic NYNEX Mobile, Inc. ("BANM") and Western Wireless Corporation ("WWC") has Interim Operating Authority ("IOA") to operate in an RSA market where permanent licensees have

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<sup>1</sup> The RSAOG is responding to a Commission request for Comment, and in so doing is not seeking the dismissal of any of the pending RSA applications which have been accepted for filing. Accordingly, the RSAOG respectfully requests waiver of the Commission's service requirement so that RSAOG need not serve each pending applicant. Such a waiver is not appropriate for those who do seek dismissal of pending applications. See Motion to Strike and Request for Sanctions Against CCPR filed concurrently herewith.

("IOA") to operate in an RSA market where permanent licensees have not yet been selected and for which it now desires to apply and bid.

The comments of WWC and BANM should be accorded no weight because, regardless of the methodology ultimately selected by the Commission, neither of those parties are eligible to participate in the licensing process in those markets where they have IOA. In their applications for IOA, WWC and BANM disclaimed any intent to obtain through the grant of their respective IOAs any standing to petition or otherwise protest the grant of any application for permanent authority in the market where the IOA was requested. As a condition to grant of IOA, each was required to certify that it was not an applicant for permanent authority, and to dismiss its application if it was an applicant. However, to afford the FCC a complete record on this matter, RSAOG will address the substance of the comments of WWC and BANM.

**I. Dismissal Will Violate Due Process Rights**

**A. Case Law Precludes the Commission from Auctioning These Licenses**

The Commission does not have the authority to simply dismiss applications that were timely filed and "cut-off" from the filing of subsequent applications, prior to issuance of a final authorization to a qualified applicant. See, e.g., McElroy Electronic Corp. v. FCC, 59 F.3d 248 (D.C. Cir. 1996); Florida Institute of Technology v. FCC, 952 F.2d 549 (D.C. Cir. 1992). These precedents preclude the Commission from further delaying, much less eliminating, the previously-scheduled relotteries.

**B. The Pending Applicants Have Continued to Prosecute Their Respective Applications**

Both WWC and BANM claim that applications pending at the Commission for eight years are probably no longer viable. WWC Comments at p.5; BANM Comments at p.9. Neither offers any evidence to support that bald assertion. From the comments filed, it would appear that there are more pending applicants still interested in receiving a license for which they timely applied than there are new persons interested in bidding for the subject RSA licenses in an auction. In any event, the Commission does not have the authority to simply extinguish the due process rights of all pending applicants in these six RSA markets.

BANM and WWC claim that the pending RSA applicants were participants in one lottery and have gotten what they supposedly bargained for (that being, according to BANM and WWC, participation in a single lottery). WWC Comments at 7; BANM Comments at p.10,n.15. But again, the notion that this is what the pending applicants paid the FCC for is merely a bald assertion by BANM and WWC. Numerous first-ranked MSA cellular lottery winners ultimately were disqualified, and what RSA applicants "bargained for" was the same process as the FCC had employed in the MSA licensing process -- random selection until a qualified applicant is chosen.

When the public was invited to file for these six RSA markets, the Commission never suggested that if the first comparatively superior applicant was disqualified, the Commission would do anything other than return to the pool of cut-off applications to make another selection. Crystal Communications Systems ("Crystal")

Comments at p. 6-7. In the event an unqualified applicant was selected, there was to be a relottery following the dismissal of the unqualified "tentative selectee." Committee to Preserve Lottery Selection Comments at p.10. In fact, in every prior case where a tentative selectee was selected by lottery and then subsequently disqualified, a relottery from among the remaining applicants in the applicant pool was held. Crystal Comments at pp.6-7.

BANM claims that the FCC has the authority to change the procedural rules and methodology for granting licenses at will, even after the applications are on file, protected and cut-off, citing the Commission's shift from comparative hearings to lotteries in 1985. That post-filing change in methodology was affirmed by the U.S. Court of Appeals for the District of Columbia in Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551 (D.C. Cir. 1987). BANM Comments at pp.3-5. As RSAOG pointed out in their initial comments, two critical factors that led to the court's decision in Maxcell are not present in the instant proceeding.

Prior to filing their MSA cellular applications for markets 31-90, cellular MSA applicants were on notice of the possibility that the Commission would use lotteries instead of comparative hearings to select licensees if it was granted authority to do so by Congress prior to initial processing. Id., 815 F.2d at 1555. In contrast, when the RSA applicants filed their applications, the notion of auctioning spectrum had not been mentioned by the Commission in the order setting forth the RSA processing rules. See RSA Further Order on Reconsideration, 64 RR 2d 1360 (1988).

Also, the Maxcell Court held that rather than increasing the burdens on applicants that already had applications on file, as the change from lotteries to auctions would<sup>2</sup>, the change from comparative hearings to lotteries greatly reduced the financial burden of prosecution for the applicants. Id. Finally, of course, in Maxcell, pending, protected and cut-off applications remained pending, protected and cut-off.

## **II. Auctions Will Delay, Not Expedite, Issuance of Permanent Authorizations**

Both WWC and BANM claim that auctions represent the fastest way to select permanent licensees in these six RSA markets. WWC Comments at p.8; BANM Comments at p.6. This is simply not the case. Before CCPR commenced its illegal blitzkrieg of Commission staff members, apparently authorizing the postponement, lotteries for these six markets were scheduled to take place on September 18, 1996. CCPR has already delayed selection of a permanent licensee in these six RSA markets by more than sixty days. And should the Commission decide to utilize auctions, the possibility of a court challenge to that decision which would only further delay the selection process. See Comments of RSAOG at p.13; Crystal Comments at pp.3-4 and Comments of WWC at p.8 (auctions should be postponed until all administrative and judicial review is complete or else full value of license will not be realized).

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<sup>2</sup> See, e.g., Price Cellular Comments at p.5; Applicants Against Lottery Abuse Comments at p.9.

Whether or not challenged in court, the use of auctions to license these six RSA would require significant rule development, a whole new application process and great administrative cost. And there would be no guarantee of winners any more qualified than lottery winners would be.

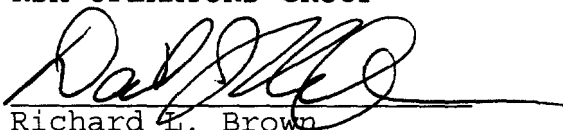
#### CONCLUSION

Based on the foregoing, the Commission should deny CCPR's Petition and immediately conduct lotteries to select licensees for the six subject RSA markets.

Respectfully submitted,

**RSA OPERATORS GROUP**

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CERTIFICATE OF SERVICE

I, Melissa L. Clement, a secretary at the law firm of Brown Nietert & Kaufman, Chartered, do hereby certify that I caused a copy of the foregoing "**Reply Comments of RSA Operators Group**" to be sent via first class U.S. mail, postage prepaid or hand delivered, this 10th day of December, 1996 to each of the following:

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